FACULTY OF LAW

UNIVERSITY OF TORONTO

MATERIALS ON CONFLICT OF LAWS

November, 1992

Volume III

John Swan

Aird & Berlis
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We are grateful for the help that has been given by students, now too numerous to mention individually, over the past many years in the constant revisions in the organization and text of these materials.

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province to one of the states of the United States. This point was behind the reasoning of Mr. Justice Gordon in *Gunn* when he pointed out how insignificant was a change of domicile from one province to another (at least, particularly so between Manitoba and Saskatchewan when the same divorce law could be applied in both).[17] It could therefore be argued that *Trottier v. Rajotte* should not be regarded as authority when the change of domicile occurs within Canada. *Gunn* attempted to reconcile *Trottier v. Rajotte* with the view of Vice-Chancellor Kindersley in *Lord v. Colvin*, but even so, the authority for the latter view is weak, to say the least. Both *Gunn* and *Osvath-Latkoczy* may be regarded as *per incuriam* judgments since neither court was aware of what had happened in *Moorhouse v. Lord*. In any case, *Osvath-Latkoczy* by ignoring *Trottier v. Rajotte* is weak authority, and could clearly be reconsidered by the Supreme Court of Canada, though, as has been suggested, *Trottier v. Rajotte* could be distinguished. The law at the moment would therefore appear to be that the most recent pronouncement of the Supreme Court of Canada, *Osvath-Latkoczy*, should govern in cases where the change of domicile is between Canadian provinces,[18] but that in other cases, *Trottier v. Rajotte* has either to be reconciled with *Osvath-Latkoczy* (a difficult task) or else got out of the way by being distinguished, or regarded as no longer good law. It is clear, at least that no court can ignore the contradictions between *Osvath-Latkoczy* and *Trottier v. Rajotte*, and it is to be hoped that the Supreme Court of Canada will soon clarify the law.

NOTES

1. The traditional English view of the intention necessary to support the acquisition of a domicile of choice was based on the belief that it was nearly incomprehensible that an Englishman would ever want to change his domicile to some other jurisdiction. The cases already mentioned where the rule was laid down with uncompromising severity were, however, a case involving an American, *Winans v. A.G.*, [1904] A.C. 287, and a Scotsman, *Ramsay v. Liverpool Royal Infirmary*, [1930] A.C. 588.

2. As you will have noticed, the concept of domicile is independent of the purpose for which it is being used. The most obvious fact to demonstrate this statement is that texts like *Dicey & Morris*, *Cheshire and North* and *Castel* discuss the concept at the beginning of their works and nothing turns on the issue before the court. This placing of the discussion in those texts indicates that the concept can be "factored out" of the cases where it is applied and treated like an all-purpose tool, equally well adapted to dealing with the question whether a particular court is the appropriate court to

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17 This view may be contrasted with the view that a domicile of choice can be lost more easily than a domicile of origin. See, *Re Flynn*, [1968] 1 All E.R. 49. The only comment that can be made is, why?

18 The 1968 *Divorce Act* makes inter-provincial changes of domicile far less important. Such changes are now only important in cases of succession or, possibly, some aspects of capacity, e.g. capacity to marry or to make a will.

dissolve a marriage or whether a person's estate should go as his or her will directs or as some rule restricting testamentary capacity should direct.

3. It is significant, for example, that *Winans* was a tax case (many of the English cases are tax cases: liability to British tax being based on domicile rather than residence) and the deceased's liability to tax depended on his being domiciled in England. The House of Lords held against the taxing authority. In *Ramsay* the validity of a gift by will to a charity depended on the deceased's dying domiciled in Scotland. The House of Lords held in favour of the charity. To what extent are the issues the same as those raised where the court has to determine whether one Canadian court can properly hear a petition for divorce? The English courts are not immune to the pressures to reach sensible decisions and, to take two cases out of many, *May v. May*, [1943] 2 All E.R. 146, and *Cruh v. Cruh*, [1954] 2 All E.R. 545, suggest that the courts are in practice concerned about the effects of their decisions. You must keep the purpose of the inquiry into a person's domicile firmly in mind as you read the cases.

4. The three domicile cases we have studied thus far, *Gunn*, *Stephen* and *Osvath-Latkoczy*, arose out of moves persons made in connection with their employment. Either they moved from one jurisdiction to another in order to take up a new job or their existing employment required them to re-locate. What about the situations where persons reside (*i.e.*, sleep, watch television, spend weekends) in one jurisdiction but work in another? Traditionally the domicile would be the former jurisdiction, however a recent case indicates that the importance of the employment relation must not be overlooked: *Re Urquhart Estate* (1990), 74 O.R. (2d) 42 (High Ct.) was a complicated case in which the court had to decide whether the deceased had at the time of his death been domiciled in New Zealand, Ontario, Québec, Florida or New York. The head office of his employer was in Kanata, Ontario and while working there he resided either with friends in Ottawa (where he paid no rent) or at one of a number of properties he owned in Québec. His employment had taken him to Florida and at the time of his death he had been living there several years. In finding that the deceased had died domiciled in Ontario, Austin J. put considerable emphasis on the fact that his employer was based there and that the deceased's principal attachment was to his job. He wrote: (at 53)

> It is argued that the time spent in Québec and the property bought there are inconsistent with either residence or intention respecting Ontario. In my view, this is not the case. What is overlooked by that argument are the proximity, convenience and attraction of the Gatineau area in general and Wakefield, Kirk's Ferry and Larrimac in particular. Urquhart was a worker and a very gifted on by all accounts. He worked long hours. His work was in Ottawa and Kanata. On the evidence, I must find that he spent weekends and holidays at various properties in Québec, some owned, some rented, some

just visited, but Ottawa was where he "lived". I find that Urquhart had established a domicile of choice in Ontario by the summer of 1980.

5. It would not be hard to raise all kinds of awkward questions involving the application of the common law rules of domicile. The exams set by Conflicts teachers years ago are full of them. The judgments that you have just read are all too typical of Canadian judging. No effort is made, even by the Supreme Court, to consider its own previous judgments, and, as you can see, the law is inconsistent and unpredictable.

6. The next case establishes one of the most startling propositions of the common law. The case deals with what must be a common occurrence in individuals' lives, that is when a person (*ex hypothesi* an adult male or an unmarried adult woman) leaves a domicile of choice with no intention of returning; where one, so to speak, shakes off the dust of that domicile from one's feet. It is an axiom of the common law that no one can be without a domicile, so what is to happen when a person leaves a domicile of choice with no intention of returning or, possibly intending never to return? It is this question that the next case answers.

Udny v. Udny
(1869), L.R. 1 Sc. & Div. 441 (H.L.)
(Lord Hatherley L.C. and Lords Chelmsford, Westbury and Colonsay)

The late Colonel John Robert Fullerton Udny, of Udny, in the county of Aberdeen, though born at Leghorn, where his father was consul, had by paternity his domicil in Scotland. At the age of fifteen, in the year 1794, he was sent to Edinburgh, where he remained for three years. In 1797 he became an officer in the Guards. In 1802 he succeeded to the family estate. In 1812 he married Miss Emily Fitzhugh, — retired from the army, — and took upon lease a house in London, where he resided for thirty-two years, paying occasional visits to Aberdeenshire.

In 1844, having got into pecuniary difficulties, he broke up his establishment in London and repaired to Boulogne, where he remained for nine years, occasionally, as before, visiting Scotland. In 1846 his wife died, leaving the only child of her marriage, a son, who, in 1859, died a bachelor.

Some time after the death of his wife Colonel Udny formed at Boulogne a connection with Miss Ann Allat, which resulted in the birth at Camberwell, in Surrey, on the 9th of May, 1853, of a son, the above Respondent, whose parents were undoubtedly unmarried when he came into the world. They were, however, united afterwards in holy matrimony at Ormiston, in Scotland, on the 2nd of January, 1854, and the question was whether the Respondent, under the circumstances of the case, had become legitimate *per subsequens matrimonium.*

The Court of Session (First Division) on the 14th of December, 1866 [3rd series, Vol. V, p. 164], decided that Colonel Udny's domicil of origin was

> wife and children, becoming, in point of fact, subject to the municipal duties of a resident in that locality; and when he had remained there for a period, I think, of thirty-two years, there being no obstacle in point of fortune, occupation, or duty, to his going to reside in his native country; under these circumstances, I should come to the conclusion, if it were necessary to decide the point, that Colonel Udny deliberately chose and acquired an English domicil. But if he did so, he as certainly relinquished that English domicil in the most effectual way by selling or surrendering the lease of his house, selling his furniture, discharging his servants, and leaving London in a manner which removes all doubt of his ever intending to return there for the purpose of residence. If, therefore, he acquired an English domicil he abandoned it absolutely *animo et facto*. Its acquisition being a thing of choice, it was equally put an end to by choice. He lost it the moment he set foot on the steamer to get to Boulogne, and at the same time his domicil of origin revived. The rest is plain. The marriage and the consequences of that marriage must be determined by the law of Scotland, the country of his domicil.
>
> [The other law lords agreed in the result.]

NOTES

1. It should be apparent now that whatever functional basis the concept of domicile may have at its core, at the periphery it is nothing more than some arcane game that conflicts cognoscenti play for amusement when they have nothing better to do with their time. It is merely an unfortunate consequence of no particular significance that individuals' lives get caught up in these games.

2. The consequence of the decision in *Udny v. Udny* was that the respondent was saved from the awful consequences of bastardy (and it is an interesting side-light to the case that following the House of Lords' decision the respondent brought suit against the appellant for having alleged that the respondent was a bastard). We cannot easily tell how much force this result might have had in moving the court to the conclusion it reached. By that date the attitude of the common law to legitimation *per subsequens matrimonium* was becoming hard to defend. Legitimation, that is the becoming legitimate by one's parents' marriage after one's birth, had been known to the civil law systems (through the canon law) for about a thousand years. The attitude of the common law was supposed to have been fixed by the Parliament of Merton in about 1250 when the barons were alleged to have cried with one voice, "Nolumus leges Angliae mutare", when it was suggested by the bishops that legitimation *per subsequens matrimonium* be allowed. The common law remained unchanged until 1926—ample time for a second thought!

3. The American rule was never the same as *Udny v. Udny*. Then a domicile of choice persisted until a new domicile of choice was acquired. To Lord Westbury's question, ". . . is it meant to be said that [a natural-born

Englishman] carries his Dutch domicile, that is, his Dutch citizenship, at his back, and that it clings to him pertinaciously until he has finally set up his tabernacle in another country?" the American answer is that it is certainly no less absurd (and probably a good deal more absurd) to have a domicile of origin revive than to have a domicile of choice persist. The latter is at least likely to have been one chosen by the person rather than one assigned to him or her at birth. The American case is *In Re Estate of Jones* (1921), 182 N.W. 227. The court in that case explains the English view on the ground that it fitted in well with nineteenth-century English views of what was only right and proper: it "was a recognition of the desire on the part of the English trader in distant lands to have his estate administered according to the laws of the land of his birth."

4. At common law the domicile of a child was the same as and changed with that of his or her father, though in exceptional cases it could depend on the child's mother. A married woman's domicile was the same as and changed with that of her husband. *There were no exceptions to this rule.* The proof of the truth of this statement is provided in the following decision of the Privy Council.

Attorney-General for Alberta v. Cook
[1926], A.C. 444 (P.C.)
(Viscounts Cave, Haldane and Dunedin and
Lords Shaw, Phillimore, Blanesburgh and Merrivale)

[This appeal arose in a petition for divorce brought by a woman in Alberta. As in *Gunn*, *Osvath-Latkoczy* and *Stephen*, the question of domicile became relevant in *Cook* because at the time the case was heard domicile within the province was the only ground on which a Canadian court might take jurisdiction to grant a divorce. In *Cook* the petitioner was a woman who had been granted a decree of judicial separation from her husband and sought a divorce before the courts of Alberta, her residence of four years. At trial it was found that her husband's domicile (and therefore hers) was Ontario, and her suit was dismissed. Her appeal to the Appellate Division was successful. The Alberta Attorney-General, who had intervened in the Appellate Division, appealed to the Privy Council. The judgment of their Lordships was delivered by LORD MERRIVALE. After taking note of the wife's argument that women who have received decrees of judicial separation from their husbands should be permitted to have their own separate domicile he continued:]

Lord Cave said: [*Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146, 158.]

> I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie. . . . The rule is no doubt abrogated by a divorce *a vinculo* and possibly (although this has not yet been finally decided)

> The contention that a wife judicially separated from her husband is given choice of a new domicil is contrary to the general principle on which the unity of domicil of the married pair depends; divorce *a mensa et thoro* gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose.
>
> Under British law one of the effects of marriage is to give to the spouses a common domicil—the domicil of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases actor sequitur forum rei. This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier v. Le Mesurier*, [1895] A.C. 517.
>
> The appeal of the Attorney-General succeeds. There will be no order as regards costs.

NOTES

1. Notice the authorities relied on by Lord Merrivale. Mrs Cook would, no doubt, have felt that the views of the Emperor Justinian who lived in the early 6th century A.D. (Justinian was the moving force behind the *Digest* which was completed in 533), Bracton (who died in 1268) and Littleton (who died in 1481) were particularly relevant in Alberta in the twentieth century. One may doubt that she thought much more of the views of Coke (who died in 1633) or Blackstone (who died in 1780).

2. The *Family Law Reform Act, 1978* changed the rules of the common law regarding the domicile of a wife. The *Family Law Act* R.S.O. 1990, c. F.3, provides:

> 64(1) For all purposes of the law of Ontario, a married person has a legal personality that is independent, separate and distinct from that of his or her spouse.
>
> (2) A married person has and shall be accorded legal capacity for all purposes and in all respects as if he or she were an unmarried person and in particular has the same right of action in tort against his or her spouse as if they were not married.
>
> (3) The purpose of subsections (1) and (2) is to make the same law apply, and apply equally, to married men and married women and to remove any difference resulting from any common law rule or doctrine.

3. The law in England was changed in 1974: *Domicile and Matrimonial Proceedings Act*, 1973, s. 1. Not all provinces have changed the common law rules. British Columbia and Nova Scotia, for example, have not yet changed the common law rules.

4. Now that *Morguard* has "constitutionalized" the conflict of laws what do you think of the chances of a challenge to the common law rule of domicile under s. 15 of the *Charter*? A recent paper, Acorn, "Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms" (1991), 29 *Osgoode Hall Law J.* 419, explores this argument.

5. The rules for determining the domicile of children were changed at the same time: the *Family Law Act* provides:

> 67. The domicile of a person who is a minor is,
>
> (a) if the person habitually resides with both parents and the parents have a common domicile, that domicile;
>
> (b) if the minor habitually resides with one parent only, that parent's domicile;
>
> (c) if the minor resides with another person who has lawful custody of him or her, that person's domicile; or
>
> (d) If the minor's domicile cannot be determined under clause (a), (b) or (c), the jurisdiction with which the minor has the closest connection.

6. The *Divorce Act* does not use the concept of domicile: residence of the petitioner or respondent being the only factor determining the power of a court to take jurisdiction to dissolve a marriage.

7. The Parliament of Canada has not changed the rules regarding a woman's domicile. We believe that it is possible, though probably unlikely, that the common law rules might be applied to determine a woman's capacity to marry—a matter under the federal power over "marriage and divorce".

8. It is with some small sense of regret that, in Ontario at least, it is no longer necessary to explore the full consequences of the common law rules regarding a married woman's domicile. We use the word "regret" deliberately because the rules are among the most brutal and unfair of all the rules that the judges applied to women and we should not forget this fact. The rule gave rise to a number of cases that are among the saddest vignettes of Victorian (and later) English social history. They include cases where the problems of widows' domiciles are discussed. A representative one is *In re Raffenel* (1863), 3 Sw. & Tr. 49; 164 E.R. 1190. Similar problems arose in *Re Wallach*, [1950] 1 All E.R. 199, and *Re Scullard*, [1957] Ch. 107; [1956] 3 All E.R. 898 (Ch. D.)

9. As has been stated, the concept of domicile relates a person to a territorial unit: a person is domiciled in Ontario, England etc. Ontario is a province of a larger federation, Canada. For certain purposes it was important that a person be domiciled in Canada rather than Ontario. The jurisdictional requirements of the *Divorce Act*, 1968, were that the petitioner be domiciled in Canada and resident in the province in which the petition was brought. For other purposes (principally succession to movable property) a person must be domiciled in Ontario for Ontario law to be applicable. The issue before the court determined whether the tests required are applicable to a Canadian or a provincial domicile. The possibility existed, and may even now still exist, that while a person who has an Ontario domicile must be domiciled in Canada, a person domiciled in Canada might have no provincial domicile. An immigrant who comes to Canada intending to remain may have the necessary intention to stay in Canada, but be unsure of what province he or she wants to live in, and, therefore, be unable to have the necessary intention to acquire a domicile in a province.

10. It was an axiom of the common law that a person could only have one domicile. The possibility of a person having a Canadian and provincial domicile was regarded as an exception to this axiom, and learned articles were written on it: Cowen and Mendes da Costa (1962), 78 *Law Quarterly Rev*. 62; Mendes da Costa (1968), 46 *Can. Bar Rev.* 252. There is nothing particularly startling about a person having two domiciles in the sense discussed above, for it simply reflects the fact that Canada is a federation. Only an English perspective regards the possibility of two domiciles as unusual.

11. Some further problems should be mentioned. Problems of domicile occasionally arise when the person in question is an illegal immigrant to Canada. The question is whether such a person can acquire a domicile here. The better view (i.e., the view that is more likely to be accepted than its opposite) is that the question of a person's common law domicile is independent of his or her status under Canadian immigration laws: *Jablonowski v. Jablonowski*, [1972] 3 0.R. 410, cf. *Bednar & Bednar v. Deputy Registrar General of Vital Statistics* (1960), 24 D.L.R. (2d) 238.

12. A curious problem has recently arisen under the *Personal Property Security Act*. In *Re Dominicus Henricus Johan Haasen* (1992), 8 O.R. (3d) 489, (Ont. Ct. (Gen. Div.) in Bankruptcy, Farley J.) the question concerned the effectiveness of a registration under the *PPSA* against a person. The name of the person on his birth certificate was in the form given in the style of cause. The registration was made in the name of "Dominic J. Haasen." The regulation under the *PPSA* require that a registration against an individual be made using his or her first name, middle name or initial (if any) and surname. Farley J. held that a registration against an individual to

be valid had to comply with the *Vital Statistics Act*, R.S.O. 1990, c. V.4, and use the name on the person's birth certificate. What if the person does not have an Ontario or Canadian birth certificate but has one from a country that has a very different system of personal nomenclature, or has no birth certificate? Would we use the concept of the domicile of origin as a solution? Would you like to advise the loans officer of a branch of a major bank what the domicile of origin of all the branches borrowers might be? Do you think that you could readily get sufficient information to give any useful advice in anything but the simplest cases? What might a solution look like?

13. We saw in *Stephen v. Stephen* that special problems can arise in the case of a member of the armed forces. An example of the courts' attitude to domicile, or more accurately, to a change of domicile is provided by *Wilton v. Wilton*, [1946] 0.R. 117; [1946] 2 D.L.R. 397. Such cases are really extraordinary and completely unjustifiable in a federal state. To require a high standard of proof for a change of domicile is simply silly for really very little depends on it. It seems that there is a real risk that we cannot escape the attitude of nineteenth century English judges and their xenophobia and chauvinistic patriotism.

14. The next case is an example of how the traditional rules for determining a person's domicile are applied. Is it only by coincidence that the result might make sense? Try to play the game with the degree of detachment that the true domicile aficionado requires for full enjoyment.

Harrison v. Harrison
[1953] 1 W.L.R. 865, (P.D.A. Collingwood J.)

Undefended petition for divorce.

The respondent husband was born in England on June 18, 1930, of English parents domiciled in England. In 1948 his parents emigrated to South Australia, but the respondent remained in England. After serving a short period in the Royal Navy he went to New Zealand while still a minor; he there met the petitioner whom he married on December 28, 1950, at Gisborne, New Zealand. Before their marriage the parties had decided to live permanently in New Zealand; the respondent with a view to training his own horses in New Zealand, was training for this business and it was decided that he should come to England, where there were better facilities, for a period of further training. He and the petitioner arrived in England on March 27, 1951, and he became sui juris on June 18 of that year, while still in this country.

On January 31, 1952, the respondent was sentenced to 12 months' imprisonment for an assault on the petitioner on November 25, 1951; on December 16, 1952, Collingwood J. gave leave to the petitioner to file a petition for divorce within three years of the marriage on the ground of cruelty. The petition was filed on January 8, 1952, and served on the respondent in England.

had no opportunity of saying what are exactly the civil rights of a putative marriage, and since the case was first heard their Lordships have had their attention directed to several other cases, which seemed to point to a settled practice as to this, which their Lordships in such a matter would not willingly disturb. They are, therefore, of opinion that the case should be remitted to the Superior Court of Quebec to deal with the civil effects of a marriage held null but allowed to be putative, it being distinctly understood that their Lordships are clearly of the opinion that the continuance of alimony to the wife is one of the civil effects, the amount of which it will be for the Court of Quebec to determine, the amount decreed for in the judgments recalled being continued in the meantime.

The costs of the appeal will be borne as between solicitor and client by the appellant, who will also fulfil the other articles of the conditions on which special leave to appeal was granted.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the case remitted to the Superior Court accordingly.

NOTES

1. *Berthiaume v. Dastous* suggests that the choice of law rule governing the formal validity of the marriage is that the marriage must satisfy the formal requirements of the place where it is performed. This rule is, apparently, mandatory. It is not only sufficient that the marriage comply with the rules of *lex loci celebrationis* (hereinafter abbreviated as *l.l.c.*): it is necessary. This rule has been hallowed by successive editions of *Dicey & Morris*, *Cheshire* and *Castel*. The last named author says: "The settled general rule is that the formalities of a marriage are governed by the law of the place of celebration. This is an application of the maxim *locus regit actum*." (*Castel*, 2nd ed. p. 285).

2. The rule in *Berthiaume v. Dastous* has always been accepted without question. The following points might be noted:

(a) This case arose on appeal from the courts of Quebec, and might have been regarded as of little relevance in the common law.

(b) The conclusion that the marriage was valid or void had possibly some, but more probably little, bearing on the issue whether the woman could obtain maintenance form the man. It also appears likely that the validity of the marriage would have had no effect on the legitimacy and the right of any children to succeed to their father's estate. To regard the marriage as invalid is, therefore, not necessarily a drastic step. (It must, of course, be recognized that the emotional and psychological impact of the decision on the woman might have been severe.

To a large extent the law has to take a much cruder approach. The law cannot make people love and respect each other. It can do little more than protect rights to support and succession. In law, issues of marriage nearly always translate sooner or later into issues of money.) To apply this case to the common law (and to ignore, for example, the strong policy represented by the *Marriage Act*, s. 31) is to invite disaster. In the common law context this effect of the decision can have very serious consequences for the parties.

(c) The civil law systems generally provide that compliance with the *l.l.c.* is sufficient but not necessary. Why does Lord Dunedin refer to the rule as a rule of "international law"? (Perhaps the civil law countries create for themselves the problems that arise from the mixing of incompatible regimes, but that is their problem.)

(d) It is, as a matter of fact, extraordinarily hard to find cases other than *Berthiaume v. Dastous* itself where the effect of the rule is to make a marriage *invalid*. The bulk of the discussion in the textbooks is either on some odd problems like the following cases or on exceptions to the rule that, had the rule been otherwise, need never have caused difficulty.

3. Special problems have arisen with proxy marriages. A proxy marriage is a marriage in which one of the parties is not present, but authorizes someone else to act as agent for the purpose of consenting to the marriage. Such marriages are unknown to the common law, but are perfectly valid in the civil law. They are valid under the rule of *Berthiaume v. Dastous* if the marriage ceremony takes place in a jurisdiction where such marriages are effective: *Apt v. Apt*, [1948] P. 83; [1947] 2 All E.R. 677, *Frustaglio v. Barbuto*, [1960] 0.W.N. 551. An argument has been made that they can be supported under the *Marriage Act*, s. 31: Canter, (1957) 35 *Can. Bar Rev.* 1195.

4. The strength of the common law presumption in favour of marriage is strongly supported by the presence of a provision like s. 31 of the Ontario Marriage Act. The provisions of the B.C. legislation do not offer quite so strong an argument, but neither do they undercut validity of the presumption nor suggest that it is irrelevant.

5. The issue raised by *Berthiaume v. Dastous* and the conflicts issues of marriage is the correct way to approach the problem. In other words, how do we begin to think about the issue of whether a couple are validly married or not? This issue will dominate much of the remainder of these materials and cuts right to the heart of the purpose of our rules and

how we should think about them. The basic common law position is that there is a strong presumption in favour of the validity of a marriage, s. 31 of the *Marriage Act* is not so much an example of the presumption as it is of the same concern expressed in the substantive law.

6. When we talk about there being a presumption, we have to ask, "What triggers the presumption?" There are two facts that raise the presumption. One is evidence of a marriage ceremony, the other is long co-habitation of the parties who are alleged to be married. When we consider these facts in a wholly Canadian context we have a fairly good idea of what facts are likely to present evidence of a marriage ceremony and of the significance of co-habitation. Very little changes in the majority of cases in the conflicts context. Almost all of the cases we or any Canadian court are likely to consider will be cases arising in the Western tradition, that is, in the Judeo-Christian concept of marriage and family. We do not, therefore, have to worry much about more exotic forms of social arrangements. If polygamy or polyandry, for example, were common, we would find it very hard to express our values in an idea that we would presume any marriage to be valid. Since conflicts cases can raise problems of polygamy, we may find that we have to be careful how we generalize our principles over the full range of problems that we might encounter.

7. For the majority of cases that we will consider we can start our process of reasoning by saying that if there is evidence of a ceremony of marriage, the onus is on the person who argues that it is invalid to show that that conclusion must be drawn. Similarly, if the parties whose marriage is in issue are dead but lived together as husband and wife, we can assume a marriage ceremony and force the person who would deny that there was a marriage to prove it. An analogous proposition can be developed in regard to contracts. A contract with the affidavit of a subscribing witness. Somewhere in the middle there is the kind of arrangement that causes the problem of the "Battle of the Forms". We cannot call the arrangement a contract without automatically precluding the question we have to consider, viz. what are the terms of the arrangement that the parties made? It is sufficient that we have a general idea of what will operate to raise the presumption. This idea takes its form from our understandings of how people typically act and of what kinds of expectations and reliance are likely to follow from certain acts of one party. Thus we justify starting from the presumption of validity in contracts because such a position is more likely to protect the parties' reasonable reliance on the mutual understandings which they believe constitute the arrangement.

8. Similarly in marriage. We do not justify the presumption in favour of marriage because of some moral belief that people who live together should be married but because the fact of co-habitation or of a ceremony typically will cause one party (usually the wife) to rely on the other

in certain clearly understood ways. So far as the law is concerned, the repeal of criminal sanctions against fornication means that we are only really concerned about the existence of a marriage and reliance thereon in so far as it provides a basis for financial support. What triggers the presumption is, therefore, the likelihood that what the parties did create in one party reasonable reliance on the other for financial support or the reasonable expectation of such support.

9. Unfortunately the law of marriage is, whether we like it or not, closely bound up with moral views and expresses a position on important moral questions. The effect of this fact is that our efforts to recognize the force of the arguments based on reliance are seriously compromised. The need to compromise arises because we have rules regarding bigamy. A marriage will be invalid because one of the parties was married at the time he or she went through the subsequent (second) ceremony of marriage. We cannot, therefore, give effect to our concern for anyone's reliance on a second marriage because evidence of the previous marriage forces us to hold the second marriage invalid.

10. The problem of deciding when or how to start reasoning about the issue of the validity of a marriage is not changed by the recognition of the effect of our rules regarding bigamy. We still can justify the presumption in favour of marriage because that is most likely to lead to sensible and satisfactory decisions even though we knew that we may be forced to adopt a solution in the individual case which we know will defeat one party's reliance or reasonable expectations.

11. As you read the next case consider how you think the process of thinking about the marriages should begin and when it should end. Consider some of the obvious factual variations and whether your analysis allows for different results and whether these are more or less satisfactory than others that are possible. What effect does the fact that this is a conflicts case, that is, a case with geographically complex facts, have on any aspect of your or the court's analysis? Does the conflicts aspect of the case provide flexibility that would be denied were it a case wholly in England, Austria or Canada? Do you think that the court had adequate information about the law of Austria? If not, what further information would you like?

12. Are you helped by the following statement concerning the rules of bigamy?